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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

07-00054-5-JRL

C O P Y

In re:

D&M LAND COMPANY, LLC,)
Debtor.)
TRANSCRIPT OF HEARING

Motion by Debtor for Final Decree

Tuesday, January 5, 2010
11:10 o'clock a.m.

Honorable Catharine R. Carruthers Presiding

Atlantic Professional Reporters
Winston-Salem, NC 27116-1672

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APPEARANCES OF COUNSEL

Stephani W. Humerickhouse, Esq.

Gregory B. Crampton, Esq.

Daniel C. Bruton, Esq.

Kevin Sink, Esq.

OTHER APPEARANCES

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I N D E X

PROCEEDING

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EXAMINATION

Witness	Direct	Cross	Redirect	Recross
Sink, Kevin	40			
By the Court	56			

FINDING OF THE COURT	--
ADJOURNMENT	82
REPORTER CERTIFICATE	83
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E X H I B I T S

Name	Offered By	Identified	Admitted
Exhibit 1	Movant	53	56
Exhibit 2	Movant	53	56

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1 P R O C E E D I N G

2 (11:10 o'clock a.m.)

3 THE CLERK: D&M Land Company LLC,
4 its motion by debtor for final decree.5 Attorney for debtor is Stephani
6 Humrickhouse and Gregory Crampton. Attorney for
7 creditor is Walter W. Pitt and Daniel Bruton.
8 Bankruptcy administrator is Marjorie K. Lynch.9 THE COURT: Good morning. Happy New
10 Year.

11 MS. HUMRICKHOUSE: Good morning.

12 MR. BRUTON: Dan Bruton with BB&T.
13 I -- I guess this is my motion, or at least my
14 objection to their final -- motion for final decree.15 I don't know how the Court wants to go
16 about dealing with this. I guess the first issue
17 would be whether BB&T has a lien on the \$65,000
18 deposit.19 If that question's answered in the
20 affirmative, then I guess we get into the issues of
21 506(c) and things of that nature.22 THE COURT: And did you get a chance
23 to review the documents that were filed last night?24 MR. BRUTON: Well, I read them. I
25 haven't studied them as I would like. And as Your

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1 Honor knows, there's a local rule that requires
2 papers be filed within three days. But we'll deal
3 with it as appropriate.

4 THE COURT: Well, let's -- let's
5 deal with the first issue first.

6 MR. BRUTON: Okay. I'm sure Your
7 Honor has read all the papers. A -- a little bit of
8 background -- I'll try to be brief.

9 This case has a genesis with Ronald Dwayne
10 White, Grand Eaton Ferry Sales and Service. And that
11 was a boat retail store out in Lake Gaston, North
12 Carolina. As hindsight would have it, Mr. White was
13 double financing his boats with GE Commercial Finance
14 and BB&T. GE had a prior secure -- prior -- prior
15 UCC filing, BB&T the second. GE got paid almost in
16 whole. BB&T got stuck holding an empty bag in the
17 Eaton Ferry bankruptcy case -- left owing, I think,
18 \$6 million, give or take.

19 Right when that house -- house of cards
20 came crumbling down, BB&T had refinanced the loan to
21 the debtor here, D&M Land Company, to finish the
22 construction of a facility in Raleigh that they were
23 going to open up a new boat store. That loan was
24 extended into September of '05. Dwayne White's fraud
25 came to light right around December 1 of '05. So the

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1 D&M loan was only in place for three or four months.
2 D&M never had any operations, never had any
3 employees, never opened their doors, never sold a
4 boat.

5 The loan to BB&T was secured by a -- a
6 security agreement granting a security interest in
7 various items, equipment, inventory, general
8 intangibles. There's also a deed of trust that
9 granted to B -- BB&T a lien on all the proceeds, the
10 disposition of the land, all rents and profits.

11 D&M filed bankruptcy in, I think, January
12 '07. Prior to that, there was a sale -- a contract
13 to Zion Church, as the parties have called it. A
14 \$65,000 deposit was paid at that time.

15 The bankruptcy case was filed in '07,
16 January '07. Subsequent thereto there were some
17 amendments to the contract. Counsel for D&M filed a
18 motion to approve the sale to Zion Church. That sale
19 was approved -- or an amended contract was approved
20 that still contained the initial \$65,000 deposit, an
21 initial 5,000 deposit -- deposit, and two extension
22 fees for \$25,000 a piece.

23 Later another contract was entered into
24 after those closing deadlines had passed, and an
25 additional 65,000 -- or I think it was actually

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1 67,500 deposit was paid. In total, the debtor
2 collected approximately \$183,000 from Zion Church and
3 they ultimately never closed on the property.

4 In the meantime debtor's counsel filed a
5 -- a fee application for \$179,000 in fees, I think,
6 something like that. And they also filed a motion to
7 seek the use of BB&T's cash collateral. BB&T, of
8 course, objected to that on the grounds that it had
9 an interest in the general -- general intangibles,
10 and all, you know, admittedly from the get-go.

11 I think this -- this fourth circuit case,
12 which is the Old Stone Bank case, is the dispositive
13 of this hearing today.

14 Admittedly, I didn't -- nobody knew about
15 that case back when the cash collateral motion was
16 first heard before Judge Small. It wasn't discussed
17 -- nothing.

18 I learned of the Design -- or the Old
19 Stone Bank case subsequent to that in rela -- in --
20 in connection with another case. And I read it and I
21 instantly knew it had application to this case as it
22 ---

23 THE COURT: --- Judge Whitley's
24 case?

25 MR. BRUTON: I beg your pardon?

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1 THE COURT: Judge Whitley's case, I
2 take it, the deposit case in the west? Is that ---

3 MR. BRUTON: --- I -- I don't -- I
4 don't think it was Judge Whitley. I -- I don't
5 remember.

6 But -- so, anyhow, so Judge Small entered
7 an order saying we're going to let them -- and -- and
8 not that it has any relevance today -- but, frankly,
9 the whole 83,000 -- \$183,000 would've been subject to
10 BB&T's deed of trust. We didn't argue that before.
11 We told Judge Small we're interested in the \$65,000
12 at issue. And that's what we're here arguing about
13 here today.

14 Judge Small entered an order saying we'll
15 -- we'll -- we'll let them use the money. If BB&T
16 doesn't get paid in full in the future, then we'll,
17 you know, have a hearing at a later date.

18 The sale to Zion Church fell through for
19 6.5 million dollars. The backup sale to South --
20 South Bridge Fellowship, I think it was, for 6.3
21 million dollars fell through. They collected \$30,000
22 from that earnest money deposit -- which they applied
23 to their attorney's fees, I presume.

24 You know, global recession, real estate
25 market collapse in property sales, ultimately an --

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1 an auction in March of 2008 for 4.2 million dollars.
2 BB&T was the high bidder -- submitted a credit bid --
3 facing deficiency over a million dollars at this
4 point with -- with accrued interest and what not.

5 Debtor's firm files a motion for final
6 decree, requesting final decree. We file our motion
7 for disgorgement.

8 I want to be frank. No lawyer likes to
9 bring a motion for disgorgement, especially one
10 against a law firm where their -- one of their
11 principals is becoming a federal bankruptcy judge
12 tomorrow. Talk about a situation of cutting --
13 cutting off my nose to spite my face. But that
14 notwithstanding, I have the obligation to my client.
15 And I think BB&T has a lien on these monies and is
16 entitled to these monies.

17 It's unfortunate that the bankruptcy case
18 wasn't a success. But BB&T's not the guarantor of
19 administrative fees in this case.

20 THE COURT: All right, thank you.

21 Which one of you?

22 MS. HUMRICKHOUSE: I'm going to
23 argue. I also wanted to alert the Court that Kevin
24 Sink is also here on behalf of the debtor, D&M Land.

25 Your Honor, we apologize for breaching any

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1 local rules. This is an Eastern District case that
2 you're hearing kind of in a specialty. And to be
3 quite honest, I didn't even think of any different
4 local rules that there might be in the Middle
5 District. We don't have that three-day rule in the
6 Eastern District. So I apologize.

7 Because of the holidays that have kind of
8 come up on us, we were unable -- we would have been
9 unable to -- to respond to the latest response that
10 -- that -- or document that was filed by Mr. Bruton
11 in -- within that three-day period. And, honestly,
12 we did the best we could under the circumstances.

13 There is nothing, however, in the papers
14 that we filed yesterday that Mr. Bruton or BB&T
15 shouldn't have been completely aware of. All we did
16 was draw upon the pleadings in the case that -- that
17 I think actually should decide this matter.

18 I think this matter should be decided
19 based upon what the terms of the confirmed plan were.
20 There was a plan confirmed in this case. It was a
21 consensual plan and it was a plan that was
22 affirmatively voted for by BB&T.

23 And that plan, which is attached to our
24 latest response -- the third modification to that
25 plan, which was -- which amended the plan -- and the

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1 entire plan as amended was confirmed by Judge Small
2 -- sets out specifically what rights BB&T has in this
3 case to claim -- it -- it sets up, just like any
4 confirmed plan, what the rights of the parties are.
5 And I believe that the third modification and it's
6 provisions are dispositive of the controversy that we
7 have here today.

8 I think that Judge -- that Judge Small,
9 when he ruled upon the cash collateral motion -- and
10 -- and, Your Honor, the first thing I -- I probably
11 need to say, if I could go back, is that we disagree
12 that any of the history and background that Mr.
13 Bruton felt compelled to give the Court is relevant
14 in any way, shape, or form. If we were going to
15 litigate the relevant blame in this case, we
16 certainly could come up with some BB&T matters. But
17 it's not relevant to the issue that's before us. So
18 we won't go into that.

19 But basically there -- this was a case
20 where there was -- from the get-go the parties wanted
21 to market this property. There was a mediated
22 settlement. The mediated settlement required that
23 the debtor market this property. It was a
24 requirement at the mediation -- and I can't recall
25 whether Mr. Bruton was there. I know Mr. Pitt was

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1 there. But I believe you were there, too.

2 But one of the negotiated provisions of
3 that mediated settlement was that the debtor would
4 market this property. There was no motion for relief
5 from stay filed by BB&T in this case other than a
6 stay motion to allow them to bring an action against
7 D&M.

8 There was the Eaton Ferry case, the D&M,
9 and they felt as though they needed relief from the
10 stay to initiate an adversary proceeding. So that's
11 the only stay motion that -- that was filed in this
12 case. This mediated settlement was a global mediated
13 settlement. That mediated settlement was then
14 incorporated into a plan that was consensual and that
15 was confirmed.

16 So we have a new document that now
17 regulates and determines the rights of the parties.
18 And that new document in -- in specific part -- and I
19 -- if I could refer the Court to the third
20 modification -- basically says that BB&T asserts that
21 it holds a perfected security interest in debtor's
22 general intangibles. And that said security interest
23 covers 65,000 of monies received by the debtor as
24 earnest money relating to the sale of debtor's real
25 estate.

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1 The debtor disputes BB&T's secured claim
2 in that disputed escrow funds. And so the plan
3 provides that BB&T shall retain its security interest
4 in debtor's general intangibles to the extent the
5 same existed on the petition date and to the extent
6 any such security interest was valid and enforceable
7 post petition.

8 In the event the validity of BB&T's
9 asserted security interest in the disputed escrow
10 funds becomes a pertinent issue post confirmation,
11 the court shall determine the issue -- retention of
12 jurisdiction by the court.

13 Debtor retains its right to contest BB&T's
14 asserted security interest in the disputed escrow
15 funds including the right to seek recovery from BB&T
16 pursuant to 11 USC section 506(c) of necessary costs
17 and expenses of preserving and disposing of debtor's
18 real property from and limited to the extent of any
19 allowed BB&T security interest in the disputed escrow
20 funds.

21 Your Honor, that is the provision that
22 regulates the rights and duties of both parties
23 sitting in this court room today. BB&T has the right
24 to assert its claim of a security interest in the
25 \$65,000 at issue. Its right is limited to basing

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1 that claim on the right that it asserted, which is
2 that on general intangibles.

3 And in order to know the genesis of that,
4 Your Honor, it's necessary to look back on the order
5 -- the cash collateral order that was entered by
6 Judge Small on December 7th. And in that order Judge
7 Small questions the security interest but doesn't
8 determine it. And what he basically says is that
9 BB&T acknowledges that it does not have an interest
10 in the extension fees and deposits paid by Zion
11 Temple post petition. But it contends that the
12 pre-petition deposit in the amount of \$65,000 is
13 subject to its security interest in general
14 intangibles and thus is its cash collateral.

15 The parties limited this issue to a right
16 arising out of general intangibles and they then
17 incorporated that into a confirmed plan. And so the
18 -- so the parties are limited by what this plan
19 provides. And I think that what -- the issue that is
20 very narrow, and that is, number one, does BB&T have
21 a security interest in general intangibles -- and I
22 think that we would concene that -- concede that on
23 the petition date it did in fact have a security
24 interest in general intangibles. It filed a UCC that
25 covered its general intangibles.

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1 And then the question is whether or not
2 there was any pre-petition deposit that that lien on
3 general intangibles could attach. And if so, BB&T
4 has a lien, and if not, it does not.

5 That -- now it becomes important to
6 understand the -- the actual facts of how the
7 contracts developed in this case. Prior to the
8 filing of the bankruptcy in this -- of -- of this
9 bankruptcy in January of '07, the debtor entered into
10 a form -- bar form contract, which we call the
11 original contract, for the sale of this property
12 subject to the deed of trust held by BB&T for 6.5
13 million dollars. And the debtor took a \$65,000
14 earnest money deposit. That's a pre-petition
15 contract. And that pre-petition contract, because it
16 wasn't drafted by attorneys, neglected to set forth
17 permitted exceptions.

18 THE COURT: Not to interrupt you.

19 MS. HUMRICKHOUSE: Sure.

20 THE COURT: But if you look at the
21 paragraph that you have in your supplemental
22 response, the -- the very first sentence says BB&T
23 shall retain its first deed of trust interest on the
24 debtor's real property as described in that deed of
25 trust.

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1 MS. HUMRICKHOUSE: Right. And
2 that's a normal -- you have to take that in the
3 context of a plan. BB&T did retain its right of this
4 deed of trust. No one is saying that it gave up its
5 deed of trust. And that's a normal plan provision,
6 Your Honor, that we would say you retain your right
7 to a deed of trust.

8 But you have to then look at the next one
9 where it says and they also have this claim to
10 general intangibles. And that's where this issue --
11 it -- the -- the parties did not intend -- and I
12 think that Mr. Bruton actually admitted that he was
13 not aware that there might be an argument arising out
14 of the deed of trust and therefore did not make it.

15 And that's why the court in its cash
16 collateral order very clearly says this dispute is
17 about whether or not there is a general intangibles
18 issue.

19 THE COURT: But ---

20 MS. HUMRICKHOUSE: --- And that's
21 why the parties put it in.

22 THE COURT: What Judge -- and I --
23 you know, Judge Small knows what he said better than
24 I do, but what Judge Small said is there is some
25 question about whether BB&T does hold an enforceable

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1 lien on the pre-petition deposit.

2 MS. HUMRICKHOUSE: Right. But he
3 says that in the context of him describing what
4 BB&T's position is, which is it contends that the
5 pre-petition deposit in the amount of 65,000 is
6 subject to its security interest in general
7 intangibles.

8 And -- and he -- he -- he says that while
9 the validity of BB&T's security interest in general
10 intangibles has not been fully addressed and the
11 court is not ruling on that issue, there is some
12 question about whether BB&T does hold an enforceable
13 lien on the pre-petition deposit.

14 I think you have to read that sentence
15 together. He's talking about general intangibles.
16 He's not talking about the deed of trust.

17 Your Honor, if in fact the deed of trust
18 was -- was the relevant security interest, then BB&T
19 would have claimed an interest in all of the
20 extension fees and deposits. It did not, because it
21 was not claiming its security interest as growing out
22 of the deed of trust. It was claiming its security
23 interest as growing out of the general intangibles.
24 And the -- and the judge noted that and that was then
25 placed into the confirmed plan.

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1 So it's our position that they're limited
2 -- real limited in that provision as well. The
3 debtor is limited because it cannot seek 506(c)
4 expenses in excess of the 65,000. That was the deal.
5 That's the plan provision. It was consensual with
6 give and take on both sides. You want to object,
7 BB&T -- you can object on the basis of general
8 intangibles.

9 If you can show that this deposit, this
10 \$65,000, is subject to your security interest in
11 general intangibles, then we will also have the right
12 to assert our 506(c) expenses.

13 That brings me to why I think it's also
14 not appropriate for BB&T to claim any 507 super
15 priority expenses, because a confirmed plan
16 determines what claims there can and cannot be. And
17 there are no super priority administrative claims
18 retained by this confirmed plan.

19 Now, Your Honor, the -- it -- I -- have I
20 answered your question? I -- you may not agree with
21 me. But have I answered your question so that I ---

22 THE COURT: --- Yes.

23 MS. HUMRICKHOUSE: Okay. As far as
24 -- I think it's necessary to then look at how the
25 contracts developed, because the short version that

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1 was given by Mr. Bruton I -- I think needs to be
2 elongated a little bit.

3 And that is, as I started out, there was a
4 September 2006 contract that was a pre-petition
5 contract that was on a bar form that didn't have the
6 permitted exceptions that was supposed to have closed
7 on January 18th of 2007. The debtor was unable to
8 convey the title that was required by that contract
9 because of a cellular tower lease that was on the
10 property that had been neglected to have been recited
11 as a permitted extension -- exception under that
12 contract. And when January 18th came, the debtor
13 could not convey title. Prior to January 18th, a
14 chapter 11 was filed.

15 The debtor never attempted to assume that
16 contract or have that original contract approved by
17 the court because it knew it could not comply with
18 that contract.

19 THE COURT: Well, then let me stop
20 you again and ask you to turn to the second page of
21 the amended and restated contract.

22 MS. HUMRICKHOUSE: Okay.

23 THE COURT: Paragraph five. Last --
24 last night was the first time I've heard that
25 argument raised.

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1 MS. HUMRICKHOUSE: Uh-huh.

2 THE COURT: That the debtor couldn't
3 convey title.

4 MS. HUMRICKHOUSE: Right.

5 THE COURT: And in this restated
6 contract it says the buyer specifically acknowledges
7 and agrees that the seller has performed all of its
8 obligations under the initial contract.

9 MS. HUMRICKHOUSE: And that is the
10 result of the negotiations that occurred between
11 January 18th and May 19th where Zion was contesting
12 that. So as -- and as part of the agreement to -- to
13 have a new contract that would allow Zion to continue
14 to show its interest in the property, we negotiated
15 that provision so that there would be no contest as
16 to the rights of -- or the forfeiture rights of the
17 nonrefundability of any monies received.

18 It's important to know, Your Honor, that
19 on -- in April of this year, which is one month
20 before this amended and restated contract was finally
21 negotiated, that Zion filed a proof of claim, because
22 it took the position that it had a right to the
23 return of the earnest money under the original
24 contract. And that's a matter of -- of the -- that's
25 a matter of the record in the Eastern District.

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1 The original contract had a January 18th
2 closing date and a time-is-of-the-essence provision.
3 So that contract was in default as soon as there was
4 no closing on January 18th. So there is a default.

5 This restated contract, this new contract
6 is the result of five months of negotiations between
7 the debtor and the Zion Temple Church to renew their
8 interest, to evidence their renewed interest.

9 And it was that negotiation that resulted
10 in us trying very hard -- and we were involved in the
11 negotiation of this. That's why it has these words
12 in it -- to make sure that there could never be any
13 ability for them to come back and try to get money
14 from the -- from the debtor. So this is the result
15 of negotiations.

16 I mean, it's very clear that there was a
17 default under the -- under the first contract because
18 we didn't meet the January 18th closing deadline.

19 But that's why -- that's -- that is -- that contract
20 was over. It is superseded by the terms -- and I
21 think that you're familiar with the -- with the....

22 THE COURT: I understand that.

23 MS. HUMRICKHOUSE: You understand
24 that. Right.

25 THE COURT: I understand that --

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1 that your contention that because this amended and
2 restated contract said that the contract was amended,
3 modified, superseded and restated, that you contend
4 there is a new contract.

5 However, Judge Small has already made a
6 finding in his order regarding the use of cash
7 collateral at the top of page two that the original
8 contract was amended post petition. That's Judge
9 Small's finding.

10 MS. HUMRICKHOUSE: Let me just find
11 that quickly, Your Honor.

12 THE COURT: It's in the order
13 regarding the motion for the use of cash collateral,
14 page two.

15 MS. HUMRICKHOUSE: And -- and that's
16 -- and -- and I'm not sure that that is anything
17 other than his narrative. I'm not sure that that's a
18 finding, Your Honor. I understand why you would --
19 you would see it that way. But I think it was -- at
20 that point in time the original contract is -- is --
21 he's -- he's basically telling a story about how this
22 -- this case developed and how there were more than
23 one contract. I think that's an unfortunate use of
24 words and I don't think he intends to make a finding
25 at that point. But I can understand Your Honor

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1 seeing it that way.

2 The original contract could not have been
3 amended post petition without court approval. That
4 original contract was never approved by the court.
5 There never was a motion to approve it. What was
6 approved was the amended and restated contract. And
7 -- and -- and -- and that -- that clearly is our --
8 our -- our argument.

9 And -- and there was an -- there was a
10 reason why there had to be a new contract -- because
11 we had to be able to permit the exceptions that we
12 needed in order to be able to convey good title. We
13 could not convey good title under the original
14 contract.

15 And in -- in bankruptcy, in a chapter 11,
16 we would have to be able to assume -- either assume a
17 contract -- if -- if in fact this contract was a
18 pre-petition contract, then we had to assume a pre --
19 or reject a pre-petition contract. We couldn't just
20 do nothing with it. I mean, it had to be assumed.

21 THE COURT: Well, then what's the
22 reason for using the words amended and restated?
23 What's the purpose of that at all if it was a
24 completely new contract?

25 MS. HUMRICKHOUSE: I think it was

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1 meant to try to reflect the fact that we were dealing
2 with the same parties and that we were reinvoking the
3 negotiations and trying to maintain the relationship.

4 You know, at the time, Your Honor, I mean,
5 obviously nobody was thinking that we would be here
6 today. And, you know, should it have been new
7 contract -- I mean, you can tell that it's a very
8 different type of contract. It's not a bar form. It
9 is obviously a drafted contract. And I think that
10 the -- the -- the fact that we used amended and
11 restated -- but we clearly said superseded.

12 THE COURT: Well, amended, modified,
13 superseded all have various meanings, none of which
14 are the same.

15 MS. HUMRICKHOUSE: I -- I -- I am
16 told -- and - -and I apologize for leaning over --
17 there's a reason there's three of us here -- because
18 we were all involved in different parts of this case.
19 And I -- I believe that Mr. Sink was the one who was
20 involved in these negotiations the most. And I think
21 that the church with its congregation -- our
22 understanding of this -- in order to be able to
23 explain the fees that were necessary to -- for us to
24 agree to engage in negotiations again, they needed it
25 to be stated that way. And that -- and they had a

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1 part in naming the document is my understanding. And
2 Mr. Sink can certainly deal with that.

3 It was not intended to be -- because we as
4 chapter 11 practitioners knew that if we were going
5 to keep in any way that original contract, we had to
6 assume it. I mean, it is an executory contract if in
7 fact it did not end when we say it ended. And we
8 never chose to assume it.

9 In fact, what we did was we filed a
10 separate motion to approve the sale pursuant to the
11 amended and restated motion. And that's how --
12 that's how we proceeded.

13 MR. BRUTON: Your -- Your Honor, can
14 I inter -- and I hate to interrupt. I just want to
15 interject one thing. I'm not sure all of this is
16 relevant as to the issue of the general intangibles.
17 I didn't -- I didn't come here today prepared to have
18 an argument about whether BB&T has a security in --
19 or perfected secure -- or whether its security
20 interest in general intangibles applies to the
21 deposit.

22 When we filed our motion on October 16th,
23 I raised the Old -- the Old Stone Bank issue. They
24 responded, and they spoke about Old Stone -- Stone
25 Bank, and I responded again.

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1 Frank -- frankly -- and I'll -- when I
2 drafted my original motion in -- which was filed on
3 October 16th, it was about twice as long as it is now
4 because it did contain the general intangibles issue.
5 But I thought, well, this Old -- Old Stone -- Stone
6 Bank case totally -- oops -- disposes of all that.
7 It's not necessary. So I took it out. And so -- and
8 -- and then last night I -- I learned that general
9 intangibles is back, you know, to the floor.

10 So I'm not prepared to discuss that today
11 because I didn't know it was going to be an issue
12 today. If Your Honor determines that B -- that
13 BB&T's lien interest under the deed of trust does not
14 apply to the \$65,000, well, then we might have to
15 have another hearing on the general intangibles
16 issues.

17 So all this discussion about amended
18 contracts and what not I'm not sure is relevant as to
19 the deed of trust -- which I think is what we need to
20 discuss today, Your Honor.

21 THE COURT: Well, let me tell you
22 why it might be relevant.

23 MR. BRUTON: Okay.

24 THE COURT: Okay. In the first
25 contract, the -- normally when you think about

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1 deposits, you think that they're liquidated damages.

2 Okay?

MR. BRUTON: Okay.

4 THE COURT: In North Carolina. All
5 right, in the first contract it just says it's
6 forfeited, which doesn't make it liquidated damages.
7 All right, and that was the contract that was in
8 existence pre-petition, and basically you win --
9 pretty clear to me when you look at the Old Stone,
10 because I don't think you can distinguish that much.

11 This amended and restated contract has the
12 liquidated damages provision in it. And it covers
13 the 65,000 plus the -- the extra money. But I don't
14 know that if you had a lien at the time that the case
15 was filed, that this can do anything to take away
16 your lien.

17 MR. BRUTON: This meaning?

18 THE COURT: This -- the restated
19 contract, where it talks about liquidated damages --
20 because to -- to me that's sort of where, you know,
21 you look at the fourth circuit and you go, gosh, you
22 know, isn't it a liquidated damage claim as opposed
23 to proceeds, such that it would go back to the debtor
24 -- because I think that's what happens with our
25 chapter 7 trustees basically. If they take a deposit

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1 and somebody doesn't close, that money's not going to
2 BB&T. That money actually goes to the benefit of all
3 the unsecured creditors in the case. But that's
4 because it's treated as liquidated damages. And in
5 North Carolina, unless you designate it as liquidated
6 damages, it's not liquidated damages. And there are
7 cases out there that say if you forfeit the deposit,
8 then it's proceeds. And there again, you would win.

9 So am -- am I prepared to rule from the
10 bench today? No, no, not given some of the stuff I
11 was thrown last night. But that's why I went back
12 this morning and looked at what did Judge Small say,
13 what is -- what are the differences. And, you know,
14 I -- I don't think the -- the plan language is not
15 going to limit you to just general intangibles
16 because it says you retain your rights under the deed
17 of trust. I mean, I think you've got an uphill
18 battle. I'll -- I'll just be really candid with you.

19 MS. HUMRICKHOUSE: Your Honor ---

20 THE COURT: --- And I -- and I --
21 you know, I don't -- I -- nobody likes taking away
22 fees, to know that the firm's got to go and amend tax
23 returns and stuff like that. I think Judge Small ---

24 MS. HUMRICKHOUSE: --- Actually the
25 firm doesn't have to do that, Your Honor. The three

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1 people sitting at this table ---

2 THE COURT: --- Okay.

3 MS. HUMRICKHOUSE: --- Have to write
4 a check.

5 THE COURT: Okay, all right. Well,
6 but then the firm should have to amend tax returns
7 because it's not all income that flowed down. So
8 there are -- you know, there are all those -- there
9 are all of those issues.

10 I -- I think if Judge Small had any
11 expectation that the property wouldn't have brought
12 enough, that he'd have said you don't know what's
13 happening with the 65, park it.

14 MS. HUMRICKHOUSE: See, I -- Your
15 Honor, I -- I -- I -- with all due respect, I -- I
16 was at that hearing and -- and I don't think that's
17 what he would have done. And, of course, this is
18 speculation -- because I think that he had sincere
19 doubts that this was a pre -- we had made the
20 argument about it being a novation. And he -- and he
21 says I have -- there is -- you know, I have questions
22 as to whether or not this is a -- they have a
23 security interest.

24 To be honest with you, my take was that he
25 was in fact leaning the other way and that's -- but

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1 he didn't want to determine it, because he said if I
2 don't have to determine it, I won't determine it
3 because maybe this -- everybody -- I think everybody
4 thought the property was going to -- to solve -- the
5 -- the sale of the property was going to solve the
6 question.

7 I -- I respectfully disagree with you on
8 the fact -- the limitations of the plan. And I
9 realize that -- that what I think about that probably
10 doesn't matter. But -- but I really believe that the
11 parties intended to limit, and that as much as -- as
12 I think all of us probably at that -- at one point in
13 time said, you know, well, wait a minute. We have to
14 go back and look at what the plan said. And that --
15 and that's why we filed what we filed -- because we
16 went, wait a minute. This deed of trust issue was --
17 this was never anything that was supposed to be the
18 basis for the claim in the security interest.

19 The -- the -- the preamble, that first
20 sentence, Your Honor, is just what you have in every
21 plan, which is the debtor retains its right -- its
22 security interest in the deed of trust -- sure, no
23 question.

24 THE COURT: Well, that -- but you're
25 saying he doesn't get that.

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1 MS. HUMRICKHOUSE: He doesn't get it
2 -- because when we did the -- when we did this plan
3 modification, we were trying to cover the cash collat
4 -- there was a mediation.

5 We had a consensual plan. The -- we -- we
6 -- we all had a consensual plan. And then we had to
7 modify the plan in order to accommodate the mediated
8 settlement.

9 And the day before we make this
10 modification is the hearing on the payment of our
11 fees. And so we that day had to modify it to reflect
12 what it was that Judge Small had said. And our
13 understanding and -- was -- and I think that -- I
14 mean, Mr. Bruton has been very -- very honest. I
15 mean, I think that at the time no one knew about Old
16 Stone and -- or had found Old Stone. And BB&T was
17 riding the general intangible -- intangibles horse.
18 And that's what was -- what was on everybody's mind
19 at that point.

20 When you take that, there's an estoppel
21 that occurs. I mean, we -- we negotiated a plan
22 provision based upon the understanding that the basis
23 for this claim of the security interest was general
24 intangibles. If it was going to be something else,
25 perhaps that would've been something else. We were

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1 all on the same page at that point.

2 Mr. Bruton has told you that he didn't
3 find Old Stone until later. I'm sorry for him,
4 because I think he may have made different -- taken
5 different positions in the case. But unfortunately
6 he took those positions in the case and people relied
7 upon them and people drafted consensual plans which
8 were confirmed based upon those.

9 And -- and that's why we take the
10 position, Your Honor.

11 THE COURT: I'm going to have to
12 take a five-minute break. I'm getting calls. I have
13 a son who was in surgery this morning.

14 MS. HUMRICKHOUSE: Sure, sure.

15 THE COURT: So let me take a
16 five-minute break.

17 (11:46-11:50 a.m. - recess)

18 MS. HUMRICKHOUSE: Your Honor, if I
19 could just make one other point and -- without
20 belaboring it.

21 If you look at the third modification --
22 and I know that it's important to you what the first
23 sentence says.

24 If the first sentence was all that existed
25 in that paragraph, we would not be here today. And

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1 the reason we would not be here today is because the
2 confirmed plan without the rest of that paragraph
3 would have taken away any right that BB&T would've
4 had to make a claim for this money. The -- the
5 confirmed plan would have resolved all claims.

6 And since it wasn't contained in the
7 confirmed plan, they wouldn't have had this. They
8 wouldn't have had this right to come here and -- and
9 to -- to even -- so -- so their very right to be here
10 grows out of this third modification. It was
11 negotiated by Mr. Bruton and Mr. Pitt because of the
12 order on cash collateral. So when it came time for
13 them to cast their ballot on the plan, they demanded
14 that this provision be put in here.

15 But if it just had the first provision,
16 which is they retained their right to the deed of
17 trust, which would have been there -- and remember,
18 it's they retain their right -- their -- their --
19 retains its first deed of trust interest on the
20 debtor's real property -- then -- then we wouldn't be
21 here. We would not be here.

22 Their rights grow out of the rest of the
23 paragraph. Their very right to be here today just --
24 which is -- is -- is -- is comparable to why we say
25 -- or supportive of why we say they have no 507(a)

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1 rights -- or (b) rights -- excuse me -- because
2 that's not provided in the plan. If a right to a
3 claim is not provided for, it goes away upon
4 confirmation of the plan.

5 So I think that that adds -- it -- Your
6 Honor, to our understanding of that modification,
7 because it limits and delineates rights that would
8 not -- would under no other circumstances exist
9 except as set forth in that modification.

10 Now ---

11 THE COURT: --- So you're saying if
12 it -- I -- I just want to make sure I understand.

13 MS. HUMRICKHOUSE: Sure.

14 THE COURT: That the plan language
15 would supersede Judge Small's ruling that in the
16 event there was insufficient value in the real
17 property, that BB&T got to revisit the 65,000.

18 MS. HUMRICKHOUSE: Yes, Your Honor.

19 THE COURT: Okay.

20 MS. HUMRICKHOUSE: That is exactly
21 what I'm saying. I'm -- I -- that -- yes. And you
22 -- I -- I mean, and basically the effect of
23 confirmation under -- under section 1141 is except as
24 otherwise provided in the plan or in the order
25 confirming the plan, after confirmation of a plan the

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1 property dealt with by the plan is free and clear of
2 all claims in interest of creditors.

3 THE COURT: Okay.

4 MS. HUMRICKHOUSE: That -- that's
5 really our -- our argument, Your Honor.

6 THE COURT: Okay.

7 MS. HUMRICKHOUSE: Is that this is
8 the document now and it delineates the rights. And
9 but for the -- the sentences after the first
10 sentence, there'd be no right for BB&T to even be
11 here today notwithstanding the order that was entered
12 by Judge -- Judge Small.

13 You understand, Your Honor, it -- very
14 much our position on why we believe that this is a
15 post-petition deposit. So I won't beat that horse.
16 And under 552 general intangibles are, you know, the
17 -- you -- you give up your right in after-acquired
18 property under 552(1). And if this is not a
19 pre-petition entity, then it is after-acquired
20 property. Security interest doesn't go -- doesn't
21 attach. So I won't belabor that.

22 If the Court is unconvinced that that is
23 the -- that the plan prevails, and the plan provision
24 prevails, and that the plan says what we say it does,
25 then we believe that the Old Stone case is

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1 distinguishable. And, you know, it's -- it's hard
2 when you have a fourth circuit case that -- at least
3 I couldn't find -- was -- was cited in any other case
4 in -- in the district.

5 I mean, it's one of those where the fourth
6 circuit holds that under Virginia law -- and -- and I
7 think it's very clearly that it's under Virginia law
8 -- that a forfeited earnest money deposit is --
9 constitutes proceeds, which it must find in order for
10 552 to let the security interest breach the gap --
11 that it -- that a -- that it's proceeds of a
12 pre-petition deed of trust. And the basis that it
13 says is because proceeds as defined under the UCC
14 means the results of the disposition of the
15 collateral. And Old Stone goes on and on about
16 disposition. And then it quotes the fact that under
17 Virginia law, when a contract is executed, there is
18 an actual conveyance of equitable title under
19 Virginia law.

20 But that's not true under North Carolina
21 law. Under North Carolina law there is no equitable
22 title that is conveyed upon the bare conveyance of a
23 purchase contract. The -- the two cases that were
24 cited by Mr. Bruton, 1980 cases, are just --
25 unfortunately, I don't believe that they have

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1 anything to do with -- with the facts at hand. It's
2 easy to just find a little quote that says that
3 there's an equitable interest granted to a vendee
4 under a contract.

5 But if you look at -- at the foreclosure
6 deed of trust given by Bill and Taylor case, I mean,
7 that's the -- that's a case where everything, all the
8 rights in the land, possession, the obligation to pay
9 taxes, all of the things that one would normally put
10 with title to it were -- were conveyed.

11 So we're not just talking about a bare
12 contract here where there's -- where the court finds
13 that an equitable interest has been conveyed. But
14 we're talking about the whole ball of wax except for
15 the actual convey -- deed being recorded. I mean,
16 the commission -- the realtor's commission was paid
17 at the time of this installment contract. Insurance
18 was paid by the buyer. He took possession of it.
19 And everything but the actual recordation of the deed
20 occurred. So I think that's distinguishable.

21 The Carolina Builders case is just a case
22 where we're trying to -- to uphold the legislative
23 intent of treating materialmen fairly. And in this
24 case the poor vendee or the -- the buyer of the
25 property actually had a deed to the property, had

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1 started construction on the property, and was in the
2 midst, and the only thing that happened was that his
3 deed was delayed in its filing until after the
4 materialmen had done the work -- the construct -- the
5 construction work had been done -- by two weeks. And
6 the court said there was enough indicie -- indic --
7 indicia -- indicia of possession and ownership and
8 other of the sticks in the ball -- in the -- in the
9 -- in -- in the sticks of -- of ownership that --
10 that we're going to say that equitable title in that
11 case did -- or an equitable -- yeah, they actually
12 say an equitable interest was transferred.

13 So I -- I don't see how these two cases
14 help BB&T in showing that under North Carolina law
15 there is an actual transfer of equitable title when
16 there was a bare contract to sell property. So I
17 think that -- I think that Old Stone is actually
18 based upon Virginia law.

19 You don't get to the proceeds definition
20 that Old Stone holds onto unless you can show that
21 there was a disposition to -- so that it was proceeds
22 so that it falls under 552. And I -- and -- and I
23 believe that the fourth circuit would have found
24 differently if it was deciding under North Carolina
25 law in the Old Stone case.

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1 There is a -- I don't know how far it --
2 what I'd like to do -- and I don't know how the Court
3 wants to handle this -- but I think it's important to
4 the debtor to make some sort of record with regard to
5 the factual issues surrounding the contracts, because
6 we believe that whether or not that money was
7 pre-petition -- or related to a pre-petition contract
8 or a post-petition contract is -- is very important
9 to our position. And we'd like to -- I'd like to
10 actually put Kevin Sink, who was involved in that, on
11 the stand in order to make that record if it suits
12 the Court.

13 THE COURT: Any objection?

14 MR. BRUTON: Well, you know, again,
15 I -- I'm not prepared to -- these -- these go to
16 general intangible issues. And, you know, I -- I
17 didn't prepare to go into that today. And maybe I
18 should have, although I didn't know it was going to
19 be an issue till six o'clock last night.

20 THE COURT: All right.

21 I'll let you put Mr. Sink on the stand.

22 MS. HUMRICKHOUSE: Okay. Your
23 Honor, would it be all right if Mr. Crampton did the
24 examination?

25 THE COURT: That would be fine.

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1 MS. HUMRICKHOUSE: Thank you.

2 WHEREUPON,

3 the witness, KEVIN SINK, being first duly
4 sworn to state the truth, the whole truth and nothing
5 but the truth, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. CRAMPTON:

8 Q. Would you state your name for the Court,
9 please.

10 A. Kevin Sink.

11 Q. Okay. It would be -- would it be accurate
12 to say you're a surprise witness this morning --
13 would you say?

14 A. I -- I would say that.

15 Q. You are -- you are an attorney. Is that
16 correct?

17 A. Yes, sir.

18 Q. And you practice law with the law firm
19 Nichols and Crampton, P.A.?

20 A. Yes, sir.

21 Q. And were you involved in the
22 representation of the debtor, D&M Land Company LLC,
23 in its chapter 11 case?

24 A. Yes, sir.

25 Q. Does your practice encompass any

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1 involvement with commercial real estate and real
2 estate transactions?

3 A. Yes. In the 15 years now I guess that
4 I've been practicing law, historically commercial
5 real estate transactions have been a substantial part
6 off and on over the years of my practice.

7 Q. And you are also -- hold a legal
8 specialization designation from the state bar?

9 A. Yes. I'm an a -- a business bankruptcy
10 specialist as certified by the state bar.

11 MR. CRAMPTON: Your Honor, may I
12 approach the witness, please?

13 THE COURT: Yes.

14 MR. CRAMPTON: And I apologize. I
15 believe that the contracts -- do -- do you have
16 copies of those contracts?

17 MR. BRUTON: Yeah, somewhere.

18 MR. CRAMPTON: I believe they were
19 forwarded both to the Court and to -- it should have
20 been all of us. But these are the -- the original
21 contract and the amended and restated contract.

22 Your Honor, do you....

23 THE COURT: I have copies.

24 MR. CRAMPTON: Thank you.

25 Q. (Mr. Crampton) Mr. Sink, I've handed you

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1 two documents. Are you familiar with those two
2 documents?

3 A. Yes, sir.

4 Q. And the -- the earliest one in -- in time
5 is what we've referred to as the original contract
6 with Zion Church.

7 A. Yes, sir. And you're referring to the one
8 with the Graham Realty logo on it.

9 Q. Right. And -- and were you involved in
10 the preparation of that first contract, the original
11 contract?

12 A. No, sir.

13 Q. The -- in connection with the filing of
14 the chapter 11, you -- you were involved in -- with
15 contact and discussions with the attorney
16 representing Zion Church. Is that correct?

17 A. That's correct.

18 Q. And who was that?

19 A. It was initially a young lady in Durham,
20 North Carolina that quickly transferred to Robert
21 Gordon of the North Raleigh law firm.

22 Q. And the -- the debtor did not close
23 the transact -- sales transaction under that first
24 contract, the original contract on the Graham Realty
25 logo. Is that correct?

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1 A. That's correct. The debtor did not have
2 the ability -- the closing date sort of followed
3 shortly after the petition date. And the debtor did
4 not have the ability to close under the contract
5 because it could not deliver the clear title required
6 under within the contract.

7 And also as a -- a chapter 11
8 debtor-in-possession, there was no court authority
9 for the closings to occur ---

10 Q. --- And -- and the close ---

11 A. --- Post petition.

12 Q. The closing under that original contract
13 was required to be on or before what date?

14 A. It was January the 18th, 2007. And I
15 remember discussing that initially with the lady in
16 Durham because I believe that fell on Martin Luther
17 -- it was a Monday. It fell on Martin Luther King
18 Day. And we had discussions about it. The closing
19 date would -- would technically be the next day. But
20 of course we knew that wasn't going to happen in any
21 event. But I remember that's when the date fell.

22 Q. Okay, and is -- does the original contract
23 have a time-is-of-the-essence provision?

24 A. It does.

25 Q. And when you say that -- I believe you

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1 referenced the debtor was not able to convey a good
2 title under the provisions of the original contract
3 that was required to be closed on January -- on or
4 before January 18th, 2007, what are you referring to?

5 A. Well, specifically there was a cell tower
6 -- encumbrance on the property with respect to a cell
7 tower for the easement that existed with respect to
8 the property. I believe that's what the recorded
9 document was actually called. And that -- we could
10 not deliver it free and clear of that. And -- and
11 they were going to use it as a church. And initially
12 that was a problem for their configuration of the
13 property, and it affected their interest in the
14 property.

15 Q. The -- at -- at any time did the church
16 acknowledge that it had lost its rights or forfeited
17 its rights under the \$65,000 deposit that was paid in
18 connection with the Graham Realty contract document?

19 A. No. To the contrary, from it not be the
20 first conversation -- it would've been the second
21 conversation -- all the way up truly until the
22 post-petition contract was executed in May of 2007,
23 they were -- were consistent in asserting they had
24 the -- owned the rights to that deposit, and not the
25 debtor.

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1 Q. And because the debtor had not performed
2 under the contract?

3 A. That was their position, yes.

4 Q. Okay, and in fact the debtor did not close
5 the sale on or before January 18th, 2007. Is that
6 correct?

7 A. That's correct.

8 Q. And in -- in fact the debtor -- the
9 original contract did not list as a permitted
10 exception to title the Crown cell tower encumbrance.
11 Is that correct?

12 A. That is correct.

13 Q. And in your experience as a -- as a
14 commercial real estate attorney, would the existence
15 of that Crown cell tower encumbrance be an
16 encumbrance of -- on the title?

17 A. It would've been. They could not have
18 gotten title insurance. That would not have been
19 listed as a -- as a permitted exception.

20 Q. And the contract itself did not allow that
21 as a permitted exception.

22 A. That's correct.

23 Q. And did the debtor ever ask the court to
24 approve or to assume the original Graham Realty
25 contract that had to close by January 8th, 2007?

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1 A. No.

2 Q. And -- and do you know why that didn't
3 occur?

4 A. Because we -- we couldn't perform under
5 that contract.

6 Q. Okay, and ---

7 A. --- We being -- being -- we being the
8 debtor that we represented.

9 Q. Okay, and were -- were you involved in
10 negotiations subsequent to the Chapter 11 filing with
11 Mr. Morton representing the church relating ---

12 A. --- Yes.

13 Q. And what kind of contact or negotiations
14 were involved?

15 A. We had -- it seemed like for a while he
16 and I were speaking on a almost daily basis, whether
17 it be via telephone or -- or e-mail or -- or -- very
18 few written communications other than via telephone
19 or e-mail. But we were communicating extensively
20 regarding what the terms of, hopefully, what the new
21 contract were going to be.

22 Q. And the -- and in fact was a -- a new
23 post-petition contract arrived at with the church?

24 A. Yes. After four months of back and forth,
25 in May of 2007 that contract was executed.

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1 Q. Okay, and the -- and the new contract was
2 designated an amended and restated contract. Is that
3 correct?

4 A. That is correct.

5 Q. It -- it -- it in fact had very
6 substantial and substantive differences than the
7 original contract, did it not?

8 A. It did. And -- and as I've mentioned --
9 and I believe Ms. Humrickhouse related to the Court
10 earlier -- the -- the buyers, Zion Temple, was an
11 African-American church. And it was very important
12 to the pastor of the church who was handling the
13 negotiations in dealing with her congregation that
14 they be able to explain sort of what was going on,
15 why this was dragging out.

16 And it was important to them that we added
17 that language, really, at the request of their
18 attorney to pacify the congregation, not to have any
19 legal effect, but it was to better enable her to
20 explain to them what they were doing and who they
21 were dealing with, because they were dealing with
22 unsophisticated parishioners who just wanted to make
23 sure -- they were sort of all excited about the new
24 place to worship and they didn't want to convey the
25 impression to them that anything was changed.

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1 Q. And -- but -- but in fact the original
2 contract was not -- was not closed and was not being
3 closed.

4 A. That is -- that is correct. The new
5 contract contained the permitted exceptions. There's
6 a reference -- there's an exhibit B that references
7 permitted exceptions which refers you back to
8 paragraph six of the contract which express --
9 expressly permits the cellphone lease easement to --
10 to be a permitted exception.

11 And that was one of the bones of the
12 negotiation. We had to convince the church that it
13 still made sense for them to buy it with that
14 encumbrance on the property.

15 Q. And -- and -- and that -- that permitted
16 -- new permitted encumbrance relating to the cell
17 tower which was the subject of the negotiation is
18 specifically set out not just on the exhibit but in
19 the context of a particular paragraph -- is it five
20 or six?

21 A. Paragraph six, yes.

22 Q. Paragraph six. And can you read the --
23 that provision, please -- or at least the one that
24 relates to the permitted exception.

25 A. Buyer expressly acknowledges the existence

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1 of a continuing lease and/or easement with Crown
2 Capital South, comma, Inc., and in parenthesis, and
3 any related entities or other entities having a
4 recognizable interest, close parenthesis, relating to
5 the existing cellular phone tower located on the
6 property. And that is defined as the cell tower
7 lease, slash, easement.

8 The provisions of this paragraph, comma,
9 the exceptions set forth on exhibit B attached
10 hereto, and any exceptions relating to the cell tower
11 lease, slash, easement are hereinafter collectively
12 referred to as the permitted exceptions as the terms.

13 Q. And that post-petition contract is -- has
14 what -- bears what date?

15 A. It is dated effective as of May 9th, 2007.

16 Q. Are you aware that the church filed a
17 proof of claim -- I think the word is used sort of as
18 a -- a -- a place-holding proof of claim -- prior to
19 May 9th, 2007?

20 A. I am. And I remember that due to the
21 discussions with the church, during that intervening
22 time period. And I sort of interpreted that to be a
23 sort of leverage tool by them to sort of further
24 cement their assertions that they were entitled to
25 the \$65,000 return for their deposit.

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1 Q. And was there a concern that the church
2 might also assert damages for the debtor's failure to
3 comply with the original contract?

4 A. Yes, that was the threat in the
5 negotiations. Threat may be too strong a word. It
6 was mentioned, or suggested, as part of the ongoing
7 discussions.

8 Q. And the -- the new contract specifically
9 says, does it not, that it is -- it supersedes the
10 original contract?

11 A. Yes, it does.

12 Q. And what -- what became of -- or how --
13 what became of the \$65,000 pre-petition deposit under
14 the original contract?

15 A. It was, in effect, returned to Zion
16 Temple. And Zion Temple repaid it back to the debtor
17 as earnest money under the new contract.

18 Q. There was -- well, what language was used
19 to accomplish that?

20 A. If you look at subparagraph 2A on page one
21 of the -- the new contract, buyer specifically
22 consents to the transfer by the escrow agent as
23 defined below -- which is Graham Realty -- of the
24 65,000 in earnest money under the initial contract to
25 the earnest money deposited in accordance with the

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1 provisions of this paragraph.

2 And that was intended to avoid the
3 eviction of the debtor as they were adamantly main --
4 asserting their rights in the initial 65,000, handing
5 a check back, and then a check being -- a new check
6 being delivered to the -- to the debtor. It was
7 accomplished via the language in the contract.

8 Q. The -- the language in the new contract
9 that -- that has some acknowledgment by the buyer
10 that in effect the Chapter 11 debtor hadn't done
11 anything wrong -- are you familiar with that
12 language?

13 A. Yes.

14 Q. And where does that language appear in
15 that new contract?

16 A. The language appears in paragraph five at
17 the bottom of page two. Buyer specifically
18 acknowledge and agrees that seller has performed all
19 of its obligations under the initial contract and
20 that seller is entitled to the earnest money deposit,
21 comma, upon breach by buyer -- comma, upon breach by
22 buyer, comma, or the closing of this transaction,
23 comma, free of any or all claims of the buyer.

24 And it's important to -- to read that in
25 the context of the defined terms. The earnest money

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1 deposit as it is defined in this new contract is the
2 \$70,000 deposit. It is not the initial \$65,000
3 earnest money deposit. And that's defined in the
4 very first sentence of subparagraph 2A.

5 So what paragraph five did was acknowledge
6 not the debtor's entitlement to the old earnest money
7 deposit. It was the debtor's entitled to the new
8 earnest money deposit upon either a breach or
9 closing.

10 And what the -- the reason for the
11 reference to the initial contract was to -- as has
12 been pointed out earlier today, made clear that there
13 were no prior claims under the old contract where
14 they could come back at the closing table and say,
15 well, we're -- we've got some claim we need to deduct
16 the purchase price, or what have you.

17 But if you look at the defined terms, it's
18 clear what earnest money deposits that sentence
19 refers to.

20 Q. At the time that you were negotiating with
21 Mr. Morton, if -- if you recall, did you consider
22 that you were negotiating a new contract for -- for
23 the church and for the debtor's sale of the property?

24 A. Yes.

25 Q. And -- and that there was going to be a --

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1 in effect a new deposit, as you described, in
2 connection with the new contract.

3 A. Yes.

4 Q. And it is in fact that new contract that
5 was presented to the Court for approval.

6 A. That's the only contract that I'm aware of
7 that was presented to the Court for Zion Temple for
8 approval.

9 MR. CRAMPTON: If Your Honor please,
10 if I -- I -- I should have done this in advance. And
11 I apologize.

12 I'd like to mark the two exhibits that Mr.
13 Sink has referred to and get him to then re --
14 identify them again so that I can offer them into
15 evidence.

16 (* Exhibit 1 was marked *)

17 (* Exhibit 2 was marked *)

18 Q. (Mr. Crampton) Mr. -- Mr. Sink, the --
19 the clerk has now marked the two contracts that you
20 have been referring to earlier. And one of them we
21 referred -- you referred to as the original -- we
22 referred to as the original contract that was on the
23 Graham Realty logo. Which exhibit is that?

24 A. That's the one marked as Exhibit 1.

25 Q. So Exhibit 1 is -- would it be correct --

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1 all your references to the original contract or the
2 contract under -- on the Graham Realty logo is
3 Exhibit 1. Is that correct?

4 A. That is correct.

5 Q. Okay, and the other contract that you
6 referred to as the new contract, the amended,
7 restated contract, the superseding contract, that's
8 now marked as Exhibit 2. Is that correct?

9 A. That is correct.

10 MR. CRAMPTON: If Your Honor please,
11 that's all the questions I have. Thank you.

12 THE COURT: All right, thank you.

13 Questions?

14 MR. BRUTON: Well, not right now,
15 Your Honor, no. I'd like Mr. Sink to be subject to
16 recall on a day when we can discuss these general
17 intangible issues in further detail should it be
18 necessary.

19 MS. HUMRICKHOUSE: Your Honor, may
20 -- if Mr. Bruton is finished, may I be just heard on
21 that -- on that one point at some point when it's
22 convenient for the Court -- as to whether or not this
23 is some new event -- this general intangibles. It's
24 part of the confirmed plan in this case.

25 I don't quite understand the surprise of

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1 Mr. Bruton that is being argued.

2 MR. BRUTON: Well, the surprise is
3 you filed a pleading at six o'clock yesterday
4 evening. You filed a previous response and it wasn't
5 raised.

6 MS. HUMRICKHOUSE: And -- and I
7 don't think that -- unless there's a local rule that
8 I'm not aware of in the Middle District -- and for
9 that I apologize -- I'm not sure that arguments are
10 -- you must state all of your arguments in your
11 pleadings. And -- and we -- and -- and the only
12 reason that we -- that we did it was because it's
13 part of the plan.

14 You had knowledge of -- I don't mean to be
15 talking directly to you. But I believe that BB&T had
16 full knowledge of the provisions of the plan. They
17 negotiated them. And this is not a surprise tactic.
18 This is just part of the pleadings in the case, just
19 like any other pleading that we would -- we would do.

20 So I don't acknowledge that there is a
21 necessity for some additional time to be able to
22 argue what Mr. Bruton has already said was part of
23 his first response and that he was perfectly prepared
24 to make that argument and then decided he didn't need
25 to.

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1 MR. CRAMPTON: It -- I'm sorry, Your
2 Honor. I'm uncertain as to whether or not Mr. Bruton
3 had further questions of Mr. Sink. I do -- I do
4 intend at -- at the appropriate time, if he's
5 finished, to ask that the Debtor's Exhibits 1 and 2,
6 being the original contract and the new post-petition
7 contract, be admitted into evidence.

8 MR. BRUTON: I don't have any
9 objection to that.

10 THE COURT: All right, I'll admit
11 them.

12 EXAMINATION

13 BY THE COURT:

14 Q. Mr. Sink, when I look at your time records
15 that I have because of your 506(b) fee application,
16 they all refer to purchase agreement modifications,
17 revisions, contract amendments and modifications.

18 If -- if it was the intention to have a
19 new contract, can you explain to me why all of your
20 time entries are phrased review of proposed contract
21 modifications and revisions to the same.

22 A. Yes, Your Honor.

23 In -- as I said earlier, in my discussions
24 with counsel for Zion Temple, that is how they were
25 phrased. And -- and quite frankly, I lapsed into the

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1 colloquialism he was using, calling it a modification
2 or amendment, because that was important to his
3 client, in not a legal sense, but in the colloquial
4 sense. And that was the -- my only recollection of
5 it.

6 I don't remember thinking about time
7 entries two and a half years ago -- I guess almost
8 three years later, Your Honor. But it came to the
9 court. That's my -- that's my only recollection or
10 explanation for that.

11 Q. And did you review the drafter of this
12 agreement or the primary drafter of what's been
13 marked as exhibit B?

14 A. Yes, Your Honor.

15 Q. Okay.

16 THE COURT: Other questions?

17 MR. CRAMPTON: No, Your Honor.

18 THE COURT: All right. Thank you.

19 THE WITNESS: Thank you.

20 MS. HUMRICKHOUSE: I guess we look
21 for guidance, probably Mr. Bruton and I both, as to
22 how you want to handle a -- a lot of the rest of the
23 arguments I think made by both Mr. Bruton and I have
24 to do with whether or not a security interest is
25 found by the Court on the 552(b)(1)'s and the

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1 506(c)'s. And I don't know whether -- how you -- how
2 the Court would like to handle that.

3 And -- and I'm not sure whether Mr.
4 Bruton's even ---

5 MR. BRUTON: --- Well ---

6 MS. HUMRICKHOUSE: --- Had a chance
7 to argue that yet. So....

8 MR. BRUTON: Well, I -- I just have
9 a couple of responses to some things Ms. Humrickhouse
10 had to say.

11 THE COURT: Okay.

12 MR. BRUTON: First of all, I think
13 Your Honor hit the -- the nail on the head with
14 respect to the plan treatment. When I was reviewing
15 their response yesterday, I got out my yellow pen and
16 I highlighted the exact same line that you quoted
17 from. And that's the only page that that yellow line
18 is on, Your Honor, so I think that is the -- the
19 linchpin.

20 Ms. Humrickhouse stated that she didn't
21 believe that Judge Small -- that Judge Small's cash
22 collat -- collateral order allowing the re-visitation
23 of the disgorgement issue would still be enforceable
24 absent some pro -- provision in the plan. I wholly
25 -- wholeheartedly disagree with that statement.

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1 She spoke about how no motion for lift
2 stay had ever been filed. Yeah, that's a -- and I'm
3 not sure why that's relevant but, yeah, that's true.
4 But everybody thought the property was worth 6.5
5 million dollars based on these contracts with Zion
6 Church. You know, a -- a motion to lift stay under
7 those -- those circumstance would've had a -- the
8 same chance as a ice cube in hell, Your Honor.

9 Let's see here. They speak about the
10 debtor defaulted on the contract because it didn't
11 close before 1-18. Well, it couldn't have closed
12 before 1-18 because of the bankruptcy filing on 1-10,
13 Your Honor. It -- it simply couldn't have happened.

14 Oh, and -- and going back to this -- this
15 first line in the plan lang -- language, Ms.
16 Humrickhouse revealed that -- referred to the term as
17 real property. BB&T shall retain its first deed of
18 trust interest on the debtor's real property as
19 described in that deed of trust, etcetera.

20 Well, we also retained the proceeds of the
21 real property, Your Honor. And this deposit is the
22 proceeds of that real property.

23 And I'm not going to comment on Old -- Old
24 -- Old -- Old Stone Bank. I think that case is
25 clearly applicable to the facts of this case.

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1 THE COURT: Ms. Humrickhouse, will
2 you be needed if the Court were to rule in your favor
3 for the 506(b) hearing?

4 MR. BRUTON: 506(c)?

5 MS. HUMRICKHOUSE: I'm -- I'm ---

6 THE COURT: --- 506(c). Excuse me.

7 MS. HUMRICKHOUSE: I'm thinking
8 about it. I -- I -- I -- if there would be any --
9 candidly, probably not. I mean, I think that our
10 506(c) argument, Your Honor, is made from our fee
11 applications and the monthly reports of the debtor
12 and the financial records of our trust account, which
13 can be presented through other members of the firm.

14 THE COURT: All right.

15 And, Mr. Bruton, do you just want to stand
16 on your brief? I realize in the first place you
17 claim you never get to that point because you have
18 the proceeds.

19 But, secondly, you've also argued that
20 there was no benefit ---

21 MR. BRUTON: --- Right.

22 THE COURT: --- To the estate --
23 which I understand that legal argument.

24 MR. BRUTON: Right. Yeah, I -- I
25 stand on my brief. That's fine. I don't know if you

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1 -- I understand you don't want to have another --
2 have another hearing.

3 I -- I've glanced over the -- the time
4 entries. There's a -- there's a couple in specific
5 that I have some problems with. But -- but more
6 generally with respect to exhibit C which ---

7 THE COURT: --- Well, now they're
8 contending they're not entitled to the 132. They're
9 -- they would only be entitled to the 65.

10 MR. BRUTON: Well -- well, I think
11 ---

12 MS. HUMRICKHOUSE: --- That's
13 correct. The -- the -- the confirmed plan limits us
14 to only asserting 506(c) expenses by way of set-off
15 to a found security interest in that 65.

16 MR. BRUTON: Well -- well, right.
17 Well, that's a given. But I ---

18 MS. HUMRICKHOUSE: --- Oh, I'm
19 sorry. I thought I was responding ---

20 MR. BRUTON: --- I think we're
21 talking ---

22 THE COURT: --- Oh, I'm sorry. I
23 got ---

24 MR. BRUTON: We're talking numbers
25 here now.

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1 THE COURT: Right. Okay.

2 MR. BRUTON: I think their -- I
3 think their assessment would be that, well, their
4 total amount of the fees is 132 and the \$65,000 comes
5 off the top to pay them -- I -- I assume would be
6 their position.

7 THE COURT: I believe that's
8 correct.

9 MR. BRUTON: Right. So ---

MS. HUMRICKHOUSE: --- Our -- our
position is that there are beaucoup of 506(c) charges
that can be used to set off the 65 including the
insurance and maintenance and other actual
expenditures made from unencumbered funds of the
debtor ---

16 MR. BRUTON: --- Okay, I -- I -- I
17 ---

18 MS. HUMRICKHOUSE: --- That are on
19 the exhibit -- I believe -- D or C? I'm sorry ---

20 MR. BRUTON: --- Well, all right.
21 Well, let's ---

33

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24 start with the expenses, all right, which is exhibit
25 D.

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1 MS. HUMRICKHOUSE: Yes.

2 MR. BRUTON: Those have been paid --

3 or can I ask her some questions or....

4 MS. HUMRICKHOUSE: I'm -- I'm fine
5 with that ---

6 MR. BRUTON: --- Is that ---

7 MS. HUMRICKHOUSE: --- If it's all
8 right with you.

9 MR. BRUTON: Okay. Those have all
10 been paid -- correct -- for starters?

11 MS. HUMRICKHOUSE: Those have been
12 paid by either the debtor from unencumbered funds ---

13 MR. BRUTON: --- All right.

14 MS. HUMRICKHOUSE: --- And shown on
15 the monthly reports ---

16 MR. BRUTON: --- Okay.

17 MS. HUMRICKHOUSE: --- Or they have
18 been advanced by the law firm of Nichols and Crampton
19 in order to have -- in -- in order to get them paid
20 -- for insurance and that sort of thing.

21 MR. BRUTON: All right, okay.

22 MS. HUMRICKHOUSE: And which were
23 then run through.

24 And we have -- we have \$35,000 worth of
25 unpaid fees that are approved ---

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1 MR. BRUTON: --- All right. Well,

2 let ---

3 MS. HUMRICKHOUSE: --- In this case.

4 MR. BRUTON: --- Let's go ahead.

5 The unencumbered funds, what are those?

6 MS. HUMRICKHOUSE: The debtor had
7 income that it ---

8 MR. BRUTON: --- Rent from the cell
9 tower.

10 MS. HUMRICKHOUSE: Right. In which
11 ---

12 MR. BRUTON: --- Which was ---

13 MS. HUMRICKHOUSE: --- In ---

14 MR. BRUTON: --- BB&T's cash
15 collateral.

16 MS. HUMRICKHOUSE: In which ---

17 MR. BRUTON: --- No.

18 MS. HUMRICKHOUSE: --- The BB&T
19 never claimed a security interest.

20 MR. BRUTON: It's not our job to --
21 you're -- it's -- it's -- well, it's the debt -- Your
22 Honor, the debtor incurred income from a leased
23 tower.

24 THE COURT: Okay.

25 MR. BRUTON: That income is subject

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1 to the rents of BB&T. My understanding standing here
2 today is that those monies were used to pay -- pay
3 these expenses. No motion to use cash collateral was
4 ever drafted. No order was ever entered. But that's
5 what -- what was done. But BB didn't -- BB&T didn't
6 complain about it. But they can't come back now and
7 charge BB&T again for the same expenses.

8 MS. HUMRICKHOUSE: The confirmed
9 plan did not retain the right of those -- those
10 security interests in those funds. The confirmed
11 plan ---

12 MR. BRUTON: --- The funds were
13 already spent.

14 MS. HUMRICKHOUSE: The confirmed --
15 no, not ---

16 MR. BRUTON: --- Well, okay. All
17 right, all right, okay, okay.

18 MS. HUMRICKHOUSE: I'm -- I'm sorry.
19 I don't mean to argue with counsel. But ---

20 MR. BRUTON: --- But -- all right,
21 okay.

22 MS. HUMRICKHOUSE: --- That's not
23 true.

24 MR. BRUTON: That's -- that's point
25 number one.

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1 Point number two is, going back to exhibit
2 D, a lot of these expenses are incurred after January
3 '08 where -- when Zion Church was out of the picture.
4 In fact in the cash collateral motion that was filed
5 by the debtor I think in -- I think it was October
6 originally -- they stated that Zion Church has
7 already forfeited -- I think it was \$116,000. So
8 they can't go and assess fee -- I mean, really all
9 we're talking about is Zion Church money.

10 They can't go in and assess fees and
11 expenses after Zion Church is out of the picture,
12 Your Honor, and so that would apply to -- on exhibit
13 D, any expense incurred after January 8th.

14 Likewise with respect to ---

15 THE COURT: --- Now, explain that to
16 me again.

17 MS. HUMRICKHOUSE: Yeah. I don't
18 get that either.

19 THE COURT: I don't -- I'm -- I'm
20 not sure I'm following you.

21 Zion Church is out of ---

22 MR. BRUTON: --- They want -- they
23 -- they want to charge ---

24 THE COURT: --- Zion's out of the
25 picture ---

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1 MR. BRUTON: --- The \$65,000 under
2 506(c). In order to do so, they have to show that
3 their expenses were reasonable and necessary in
4 obtaining the \$65,000. That's -- they -- they want
5 to charge that. That's the property they -- they
6 want to charge.

7 THE COURT: I understand that.

8 MR. BRUTON: So they have to say --
9 show that their expenses and fees are necessary with
10 respect to the collection of that money -- which
11 terminated ---

12 THE COURT: --- I -- why do they
13 have to show it with respect to that particular
14 money?

15 MR. BRUTON: Because that's the
16 money they want to charge. They can't -- they can't
17 go out -- they can't say -- they -- they can't say
18 we've -- you know, we -- we did this and we generated
19 X money and we -- and BB can say -- BB&T says, well,
20 that's our collateral.

21 Then the debtor says, well, we also did
22 this. It had nothing to do with generating this
23 money. But we want to charge these fees and expenses
24 to this collateral -- although they had nothing to do
25 with this piece of collateral, the \$65,000 deposit by

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1 Zion Church.

2 They can't possibly show that anything
3 they did was reasonably and necessary with respect to
4 this deposit if it in -- if it was incurred after a
5 time that that deposit was forfeited. So that's
6 where we get to the exhibit D and the expenses after
7 January.

8 Like -- likewise with respect to exhibit
9 C, all these -- let's see here -- if I can figure out
10 which one is exhibit C.

11 MS. HUMRICKHOUSE: It would be the
12 last fee application.

13 MR. BRUTON: All the expenses there
14 were generated well after Zion Church was out of the
15 picture and the monies were forfeited.

16 Likewise on exhibit B, the first couple of
17 time entries deal -- do -- do deal with Zion -- Zion
18 Church -- the first -- I don't know -- \$2,500. But
19 as you turn to the next pages, well, then they start
20 dealing with the sale of South Bridge. The South
21 Bridge sale, of course, never materialized. Any
22 expenses incurred dealing with South Bridge, or
23 anybody else for that matter, wouldn't be chargeable
24 against the \$65,000 deposit forfeited by Zion Church.
25 So it's BB&T's position that exhibit C is essentially

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1 out of the equation as is most of exhibit B.

2 There are a couple of minuscule time
3 entries on exhibit A. I don't know if you want to
4 get into the details of that nature here and now.

5 But there are a few time entries that I would object
6 to.

7 THE COURT: Okay, just so I
8 understand what you're saying, it's your contention
9 that no expenses are available for consideration
10 under 506(c) after Zion Church is out of the picture.

11 MR. BRUTON: That's correct.

12 THE COURT: Okay.

13 MR. BRUTON: Because it -- it didn't
14 -- their efforts didn't -- weren't necessary to the
15 benefit of BB&T in that regard, because the -- the
16 money was already there and forfeited.

17 And that's why in my brief I -- you know,
18 I picked out of the thin air \$75,000. Well, if you
19 run the number -- if you use exhibit A, it's \$69,000,
20 and a couple of time entries from exhibit B, you're
21 pretty close to 75 -- \$75,000. And I just picked
22 that out of the thin air.

23 But -- so again, you have \$183,000
24 collected. They want to pay their 75. That's fine.
25 There's still 110 grand left over. Well, we want our

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1 65. That's fine. And there's still \$40,000 to go
2 around.

3 THE COURT: There's no money in this
4 case.

5 MR. BRUTON: Well, there's no money
6 -- well, you're right.

7 THE COURT: This -- this ---

8 MR. BRUTON: --- Today there's no
9 money. That ---

10 THE COURT: --- No money. They're
11 in the hole. It's just how much ---

12 MR. BRUTON: --- That's true.
13 That's true.

14 THE COURT: --- Bigger the hole ---

15 MR. BRUTON: --- But when you're
16 talking about ---

17 THE COURT: --- Is getting.

18 MR. BRUTON: --- Taking money out of
19 the -- the secured creditor's hands ---

20 THE COURT: --- I understand.

21 MR. BRUTON: All right.

22 THE COURT: All right. But I just
23 don't want you to be laboring under the impression
24 that there's still a pot of money out there.

25 MR. BRUTON: No, you're right.

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1 THE COURT: Okay.

2 MR. BRUTON: There's no money.

3 That's right.

4 MS. HUMRICKHOUSE: Your Honor, I'm
5 either confused or I violently disagree with the
6 506(c) analysis Mr. Bruton just gave.

7 506(c) allows the -- a party to charge
8 against collateral of the -- the secured party. Now,
9 there's -- we all realize that the -- the land --
10 which isn't there anymore -- was collateral. And as
11 -- as long as the -- the expense -- the charges were
12 used to preserve or help in the disposition of any of
13 the collateral, then it is a proper 506(c) expense,
14 if it's reasonable and -- and -- and -- and on -- and
15 on the other conditions of 506(c).

16 So I'm not understanding or accepting the
17 limitation that Mr. Bruton is placing on it that all
18 of -- that any 506(c) charges would have to be
19 related to the Zion Temple contract.

20 We had -- what we were doing was marketing
21 the property pursuant to the plan at the request of
22 BB&T and these charges were related to that marketing
23 effort. And they in fact were required by the -- the
24 plan and they exceeded the \$65,000.

25 THE COURT: Okay, and this was

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1 vacant land.

2 MS. HUMRICKHOUSE: No, no, Your

3 Honor. This -- this piece of property is ---

4 THE COURT: --- 18 acres on Glenwood
5 Avenue.

6 MS. HUMRICKHOUSE: It's on -- it's
7 on 70, kind of between Raleigh and Durham, right
8 almost where Briar Creek is.

9 THE COURT: Okay.

10 MS. HUMRICKHOUSE: And it has a very
11 large building on it that was -- was built for the
12 purpose of being a boat showroom.

13 THE COURT: Oh, okay, all right.

14 MS. HUMRICKHOUSE: And so therefore
15 it was a great place -- or -- or at least these --
16 these churches who were interested in it believed it
17 was a great place for their congregations. So it was
18 in fact improved land.

19 THE COURT: All right.

20 MS. HUMRICKHOUSE: That was -- had
21 to be insured, maintained, a security system, which
22 required the electricity and the utilities to be kept
23 on, which the debtor funded.

24 THE COURT: Well, these insurance
25 costs are exorbitant.

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1 MS. HUMRICKHOUSE: Yes -- because it
2 is a very large building.

3 THE COURT: What kind of insurance
4 did you have?

5 MS. HUMRICKHOUSE: Well, they filed
6 insurance reports with the -- with the -- it was --
7 it was a large amount of money per year. It was a
8 huge building.

9 MR. CRAMPTON: It was an amount --
10 it was insured in an amount, Your Honor, required by
11 BB&T.

12 THE COURT: That's ---

13 MR. CRAMPTON: --- Mr. Bruton knows
14 that. Mr. Pitt knows that. It was an amount -- and
15 we had to verify to their attorneys and to BB&T that
16 it was an -- insured for that specific amount. I
17 don't recall the specific amount. But it was an
18 amount required by BB&T.

19 MS. HUMRICKHOUSE: Who was a loss
20 payee, of course, on the policy.

21 THE COURT: Right. I understand
22 that. Okay.

23 MS. HUMRICKHOUSE: And -- and
24 obviously, Your Honor, we -- we have checks that
25 would support each and every one of those insurance

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1 premium payments.

2 THE COURT: But you made like one in
3 March, two in May.

4 MS. HUMRICKHOUSE: Well, what
5 happened was that the debtor was put on a quarterly
6 payment and sometimes missed it and had to make it
7 up. And it was never forced insured by BB&T.

8 THE COURT: Okay.

9 MS. HUMRICKHOUSE: But -- but with
10 regard to Mr. Bruton's position that these expenses
11 have to be related to the Zion, we disagree. We
12 think any expenses that were used to preserve the
13 collateral -- and at the time -- until March of 2008
14 there was a very large piece of collateral sitting on
15 Highway 70. And anything that we -- I think that was
16 when the auction was finalized -- in -- in March of
17 2008.

18 So anything up to that point we were
19 trying to market and sell it at the request of BB&T,
20 who knew that there were no other means of paying for
21 these marketing efforts.

22 THE COURT: How much money did you
23 get from the lease of the cell tower?

24 MS. HUMRICKHOUSE: I believe it was
25 \$1,500 a month, Your Honor.

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1 THE COURT: Okay.

2 MR. BRUTON: I think -- I think it
3 was a little less. It's all -- it's all in the
4 monthly reports.

5 THE COURT: Okay.

6 MS. HUMRICKHOUSE: Yeah, it's in the
7 monthly reports. And I -- and I can grab that.

8 THE COURT: All right.

9 MS. HUMRICKHOUSE: But I believe it
10 was....

11 MR. CRAMPTON: Which number are we
12 looking for?

13 MS. HUMRICKHOUSE: We're looking at
14 the cell -- the income number.

15 THE COURT: Is that the only income
16 that was generated?

17 MS. HUMRICKHOUSE: Yes, Your Honor.

18 I -- I -- you -- Mr. Bruton is correct.

19 It is 1,150.

20 THE COURT: Okay.

21 MS. HUMRICKHOUSE: Per month.

22 THE COURT: And what was the last
23 month that was paid? Did that go all the way to
24 April '09?

25 MS. HUMRICKHOUSE: I -- I will find

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1 that out for you in one second.

2 MR. CRAMPTON: If Your -- Your Honor
3 please, after the auction sale that was a required
4 provision of the confirmed plan, and while there were
5 many bidders present, BB&T ended up being the high
6 bidder. I think it then turned around and
7 immediately resold it to who their second bidder was
8 at -- at the auction.

9 But subsequent to that time, and in
10 conjunction with the closing, I did have contact with
11 Mr. Pitt in connection with forwarding checks that
12 were still being received by the debtor after the
13 closing date to Mr. Pitt. And then I think they made
14 arrangements for those payments to be paid directly
15 to the -- the purchasing entity, which was, I think,
16 a special purpose entity set up by the bank.

17 THE COURT: And when was your
18 closing date?

19 MS. HUMRICKHOUSE: It -- the -- the
20 closing was in March of 2009.

21 THE COURT: Okay, so that would make
22 sense. As the last utility charges are April, it
23 would be ---

24 MR. BRUTON: --- The -- the closing
25 was right around the end of March or beginning of

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1 April.

2 MS. HUMRICKHOUSE: Right, right.

3 THE COURT: Okay.

4 MS. HUMRICKHOUSE: So that would
5 make sense.

6 Obviously, we weren't paying any of the
7 utilities or insurance after we conveyed title.

8 THE COURT: Right. Okay, so we can
9 assume therefore probably from April 2009 forward the
10 cell phone tower money went directly to BB&T.

11 MS. HUMRICKHOUSE: Or any subsequent
12 purchaser that ---

13 THE COURT: --- Right.

14 MS. HUMRICKHOUSE: Yes, yes.

15 THE COURT: Okay, to a third party.

16 Okay, so we're just interested in filing
17 through March of 2009.

18 MS. HUMRICKHOUSE: That's correct,
19 Your Honor.

20 THE COURT: All right. Anything
21 else?

22 MR. BRUTON: There -- there are
23 cases -- cases cited in my brief regarding the
24 after-the-fact energies -- well, in fact one case,
25 the debtor was trying to sell some property, didn't

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1 sell, auctioned the property. Debtor's counsel
2 sought 506(c) expenses for the sale that failed --
3 fail -- failed as well as for the auction.
4 Bankruptcy court said you get it from the auction.
5 There's no benefit from a sale that fails. You don't
6 get it for that.

7 And frank -- and, frankly -- and this is
8 probably relevant -- we paid Mr. Crampton's fees
9 associated with the auction. And as part of the
10 closing, we were required to pay the auctioneer a
11 prior lien, and I think we paid their firm like
12 \$14,000 associated with the auction.

13 MR. CRAMPTON: Now, the -- that is
14 correct about the payment. It's incorrect about the
15 characterization.

16 This was not a 506(c) assessment. It was
17 ---

18 MR. BRUTON: --- That -- that's
19 right.

20 MR. CRAMPTON: --- A required
21 expense under the terms of the consensual plan that
22 was there must be an auction and -- and if there's an
23 auction, there must be paid the auctioneer fees and
24 expenses and the attorney fees connected with that
25 closing. So there was no 506(c) motion.

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1 MR. BRUTON: That's right. That's
2 right.

3 MR. CRAMPTON: There was no 506(c)
4 assessment. It was entirely required by and
5 consistent and pursuant to the confirmed plan terms.

6 THE COURT: All right. Anything
7 else?

8 MR. BRUTON: I don't believe so.

MS. HUMRICKHOUSE: Excuse me, Your Honor. Can I -- I -- I -- we did not deal with the 506(c) arguments that were made by Mr. Bruton as far as the -- we -- we brought your attention in our pleading to the fact that there was no benefit to the debtor. The primary benefit of the marketing scheme was for BB&T, because the confirmed plan did not allow any of the proceeds to go to the shareholder.

19 And I wanted -- and -- and a lot of the
20 cases that are relied upon by Mr. -- Mr. Bruton,
21 especially the 552(b)(1) cases and the five -- the --
22 of -- of Mr. -- of Judge Stocks and the Latham case
23 and the Mamo case, all deal with whether or not there
24 is a -- a -- a -- there is a primary and direct
25 benefit to the secured creditor. And -- and the

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1 courts do not allow the 506(c) expenses if this
2 benefit or this marketing effort that is going on is
3 really just for the benefit of shareholders or the
4 debtor itself.

5 I want to make clear to Your Honor that in
6 this case there was no benefit. The -- the plan
7 provided that any equity would actually be paid to
8 BB&T and GE as -- as -- as part of the liquidating
9 trust.

10 MR. BRUTON: Which is a true
11 statement. But that arose as a result of the
12 mediation. And they attach a copy of the mediation
13 report or ---

14 THE COURT: --- That's the 70-30
15 split.

16 MR. BRUTON: Which -- which was
17 signed ---

18 THE COURT: --- All right.

19 MR. BRUTON: --- In December 2007,
20 which was one month -- or right about the same time
21 that Zion Church was out of the ball game anyhow.

22 So the -- the -- there was a deal that
23 essentially the stake holders forfeited their
24 interests ---

25 THE COURT: --- Right.

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1 MR. BRUTON: --- To BB&T and GE.

2 Well, that was struck in December '07 when
3 -- and after the point that they had filed the cash
4 collateral motion acknowledging that Zion Church had
5 forfeited their right to the deposit anyhow.

6 MS. HUMRICKHOUSE: But not prior to
7 massive efforts on the part of debtor and debtor's
8 counsel to continue to market the property.

9 MR. BRUTON: I'll admit you -- you
10 all did a good job marketing the property.

11 MS. HUMRICKHOUSE: You just don't
12 want to pay us for it, huh?

13 MR. BRUTON: Well, anyhow....

14 THE COURT: All right, anything
15 else?

16 I don't want to not give anyone the
17 opportunity to say something. If you want to confer
18 and come back in five minutes and then say something
19 else, I'm fine with that, so....

20 MS. HUMRICKHOUSE: Do you want to do
21 that?

22 Just -- if you don't mind, Your Honor, if
23 you could give us a few minutes just to see if
24 there's anything else we'd like to place on the
25 record, we'd appreciate it.

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1 THE COURT: That will be fine.

2 All right, we'll take a recess.

3 (12:45-12:53 p.m. - recess)

4 MS. HUMRICKHOUSE: Your Honor, thank
5 you for the opportunity to discuss it.

6 But the only thing that we'd like to do is
7 that to the extent necessary -- and I'm not sure it
8 is necessary -- we'd ask the Court to take judicial
9 notice of the pleadings that we have in -- in -- in
10 the case, such as the order -- Judge Small's order,
11 the confirmed plan, the third modification.

12 I'm not sure that's necessary, but to the
13 extent that it is, we'd like you to take judicial
14 notice of it.

15 THE COURT: I certainly will.

16 MS. HUMRICKHOUSE: Thank you.

17 THE COURT: All right.

18 Mr. Bruton, anything further?

19 MR. BRUTON: Nothing to add, Your
20 Honor.

21 We appreciate you taking the time to
22 preside.

23 WHEREUPON,

24 at 12:55 o'clock p.m. the hearing was adjourned.

25

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CERTIFICATION

I, Jodi L. Howard, Notary Public in and for the County of Randolph, State of North Carolina at Large, do hereby certify;

That the hearing in the matter hereon captioned was duly recorded by me, reduced to typewriting under my supervision and the foregoing consecutively numbered pages are a complete and accurate record of said hearing;

That I am the Official Court Reporter for matters in the Court hereon captioned and that the transcript herein transcribed is the Official Record of same;

That the undersigned is not of kin nor in anywise associated with any of the parties to said cause of action, nor any counsel thereto, and that I am not interested in the event(s) thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this the 8th day of February, 2010.

Jodi L. Howard

Official Court Reporter

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CERTIFICATE OF MAILING

I, Cassandra J. Stiles, CVR, do hereby certify that a true copy of the transcription of the matter hereon captioned was served on the party named below by the placement of said transcript copy in the United States Mail, Priority Mail delivery, with proper postage affixed, addressed as follows:

Kevin Sink, Esq.

NICHOLLS & CRAMPTON, P.A.

Post Office Box 18237

Raleigh, NC 27619

This the 9th day of February, 2010.

Cassandra J. Stiles, CVR